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CHARLES ELMORE CROP

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 303

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND BRIEF IN SUPPORT THEREOF.

E. E. McINNIS,
Chicago, Illinois;
WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
ALFRED G. ARMSTRONG,
All of Topeka, Kansas;
WILLIAM OSMOND,
Great Bend, Kansas,
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(34,434)

INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Citation of opinion of Kansas Supreme Court	2
Statement of facts	3
Jury's findings of fact	7
Judgment of Supreme Court of Kansas	9
Reasons for allowance of writ	9
Prayer	10
Supporting brief	13
Grounds of jurisdiction and authorities sustaining same	13
Statement of case	14
Assignments of error	16
Argument	17
1. No evidence to show that negligent acts found by jury were proximate cause of death of Toops	17
2. Negligence found by jury was not negligence in law.	36
Sketch of station grounds at Rolla, Kansas	End of Brief

TABLE OF CASES.

Atlantic Coast Line v. Davis, 49 S. Ct., 210	14
Boldt v. Penna. R. R. Co., 245 U. S., 441, 445	14
Ches. & Ohio Ry. Co. v. Nixon, 271 U. S., 218	14
C., M. & St. P. Ry. Co. v. Coogan, 271 U. S., 472, 474	14, 32
C., R. I. & P. Co. v. Bond, 240 U. S., 449	32
Elliott on Railroads (2d Ed.), Vol. 3, Par. 1258	43
George v. Quincy, O. & K. C. Ry. Co., 139 Mo. App., 283	30
Kansas City South. Ry. v. Jones, 276 U. S., 303	37
Looney v. Metropolitan R. R. Co., 200 U. S., 480	32
New Orleans & N. E. R. R. v. Harris, 247 U. S., 367, 371	32
Patton v. Texas & Pac. Ry., 179 U. S., 658	32
Seaboard Air Line v. Horton, 233 U. S., 492, 502	13
Toledo, St. L. & W. R. Co. v. Allen, 48 S. Ct., 215	14, 38

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vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Atchison, Topeka and Santa Fe Railway Company, respectfully represents to this Honorable Court that Mabel G. Toops, as administratrix of the estate of M. G. Toops, deceased, recovered a judgment against your petitioner for the sum of $22,-

750.00, as damages for the death of her husband, M. G. Toops, who was killed in the employ of your petitioner as a freight train conductor while engaged in interstate commerce. The action was brought and tried under the Federal Employers' Liability law in the District Court of Reno County, State of Kansas, and upon appeal to the Supreme Court of the State of Kansas the said judgment was affirmed on the 4th day of May, 1929. The opinion of the Supreme Court of Kansas is reported in 128 Kan. 189 (Advance Sheets, May, 1929), 277 Pac. 57. A motion for rehearing was duly filed by the petitioner and was overruled by the Supreme Court of Kansas on the 5th day of July, 1929. The overruling of the motion for rehearing was and is the final judgment of the Supreme Court of Kansas in said cause, and said Supreme Court of Kansas is the highest court of law and equity in said state in which a decision could be had in said case. This petition for a writ of certiorari is filed within three months of the rendition of said final judgment. Your petitioner presents herewith a certified copy of the entire record and proceedings in the Supreme Court of the State of Kansas, and the opinion of said court, including the dissenting opinion of three of the Justices of said Court.

The contention of your petitioner is, in substance, that there is no evidence in the record to show how M. G. Toops, the deceased, met his death, and no evidence to show that his death was caused by any negligence on the part of your petitioner or any of its agents or employees.

Briefly, the facts in the case as shown by the evidence were as follows:

M. G. Toops had been in the employ of the petitioner as a conductor, and as such worked on various parts of the Santa Fe System. He was killed at the station of Rolla, Kansas, in the line of his duty, on August 13, 1926, at about 1:00 a. m., while acting as conductor of a train running from Elkhart to Dodge City, both in the State of Kansas. Some years prior to the date of his death he had worked as a brakeman on said division and through the station of Rolla, but this was the first trip made by him over this line for a number of years.

Rolla is a small station on the Elkhart Branch of the Santa Fe. At such station there is a main line, a passing switch, a house track and an elevator track. On the south side of the elevator track there is a bank of dirt possibly six to eight feet high, but no cut through this hill. As conductor, Toops was in charge of a train running from Elkhart to Dodge City (R. 29). Shortly after midnight the train reached the station of Rolla and cars were being switched at such station at the time Toops met his death. The movements of the cars consisted in the placing of stock cars which were already at the station, cars from the train, and in rearranging the location of grain cars. In the early movements of the crew in placing and moving cars, Mr. Toops took a part, assisting in the switching of certain cars which were attached to the train on the main track. The last time Toops was seen by any of his coemployes, or by any other person, he was stand-

ing on the platform near the station, and just before that he had a conversation with one of the brakemen in which they talked about the moving of certain cars on the industry or elevator track; and at that time he told the brakeman to attend to the movement of these cars and said, "All right, I will look out for them" (R. 24, 25, 30, 35, 39). The night was a dark night. Conductor Toops was supplied with a good electric lantern, and the rear brakeman had a similar lantern, while the front brakeman had an oil lantern. A few hundred feet east of the platform where Toops was last seen is a switch running from the main line and two hundred feet or more east of the station building and platform. This track divided, one track running directly west called the house track and the elevator track running a little south of that. After placing various cars, the remainder of the crew were engaged in placing certain grain cars which they were to spot on the elevator track. These cars were run from their original position up onto the main-line track, and then pushed back on the track which divided into the house track and the elevator track. The engine was pushing these cars from the east to the west. There were fifteen of these cars. On the top of the train pushing these cars was the rear brakeman and the front brakeman, at the time Toops body was discovered, each supplied with a lantern. About 100 feet from where the track divided there was a derail switch. While moving past this derail switch the front brakeman from the top of the train discovered a lighted lantern lying by the side of the track on the south side, and he im-

mediately signaled to the engineer to stop the train, and this the engineer did as soon as possible. It was then that the body of Toops was found under the engine tender, lying across the track, his feet to the north and his head and right shoulder over the south rail, and he seemed to be lying upon his back. His head and arm were cut off. His lantern and hat lay two or three feet to the south of the rail. At the time that his body was discovered after stopping the train his shoulders lay against a derail switch which was about 100 feet from where the switch track left the main track (R. 26, 27). The ground between the ties was not filled to the surface, but there was some dirt between the ties. From the marks on this dirt it would seem that his body had moved a short distance from the place where he was originally struck. After discovering the body of Toops, the train crew and others who had come to the scene examined the trucks of the fourteen cars which the engine was pushing. No blood was found on the rear car by any of the witnesses who examined it that night. The same witnesses examined it the next morning also. At both times marks of blood were found on all the wheels of the first fourteen cars from the engine, and also on the wheels of the engine tender. Also there were discovered bits of flesh on the wheels of all except the rear car (R. 52). Along the track on this switch there were weeds growing, and, as said before, the space between the ties was not filled up. Between the rails Mr. Toops' pencil and waybills were found. The theory of the plaintiff, as set out in his petition, was

that Toops was walking up this track or alongside of the same from the station, and that he was struck by the rear car, knocked down and the rear car passed over him without doing any injury, and that then the next car cut off his arm and head. That the state of the track and the weeds had something to do with the injury.

The rules of the petitioner give the following definitions:

> "Station.—A place designated on time table by name at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."
>
> "Yard.—A system of tracks within defined limits and provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time table or by train order may be made, subject to prescribed signals and regulations."
>
> Section 102 of the Rules reads: "When cars are pushed by an engine (except when shifting or making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."
>
> Section 24 reads: "When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Before moving the cars which ran over Toops, the engine gave no signal by whistle or probably otherwise, nor at any other time while switching (R. 24). While the cars which killed Toops were being moved,

the end of the train was not protected by a brakeman with a lighted lantern. When placing cars with a kick, it is not customary for anyone to be on the cars with a lantern to warn the other trainmen (R. 39, 40, 54, 56). It is not the habit to whistle while switching in the yards (R. 46).

At the close of plaintiff's evidence petitioner demurred to the evidence on the ground that such evidence did not disclose a cause of action against the petitioner (R. 51). This demurrer was overruled (R. 52). The petitioner introduced evidence to the effect that it was not the custom in switching on the Santa Fe, either at night or in the day time, to have a man on the rear end of cars that were being pushed backward by an engine (R. 54, 55), and also introduced additional evidence that there were no marks on the wheels of the rear car, but marks of blood and flesh on the wheels of all the other cars (R. 52).

The jury made certain special findings of fact, which are as follows:

> Q. No. 1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?
>
> Ans. No. 1. Yes.
>
> Q. 2. *a.* Was M. G. Toops killed by coming into contact with the fifteen grain cars that were being placed on the elevator track?
>
> *b.* If you answer the preceding question "Yes" state which car, if any, struck Toops.
>
> A. No. 2. The first car on west end of the fifteen grain cars.
>
> Q. No. *2.* Were there any marks of blood on the rear car of the fifteen grain cars?

A. No. 3. There was no direct evidence to show there was or was not.

Q. 4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

A. No. 4. Yes.

Q. No. 5. Did Toops know of the coming on the elevator track of the fifteen grain cars?

A. No. 5. He knew they were to come.

Q. No. 6. Was Conductor Toops supplied with a good lantern?

A. No. 6. He had a good lantern.

Q. No. 7. If you answer Q. No. 6 in the affirmative then state if he could have by the aid of said lantern seen the approaching cars.

A. No. 7. No.

Q. No. 8. Had not Toops formerly worked on the Elkhart Branch from Dodge City to Elkhart?

A. No. 8. Yes.

Q. No. 9. Had the yards at Rolla, Kansas, been materially changed since he worked on said line?

A. No. 9. We don't know.

Q. No. 10. State fully in what the negligence of the defendant consisted, if any.

A. No. 10. 1st, in not protecting rear end of 15 grain cars. 2nd, in engineer not sounding signal when starting to back cars around curve and through cut. 3rd, poor condition of track at derail switch (R. 75).

The jury brought in a general verdict in favor of plaintiff for $22,750.00 (R. 75).

The petitioner, before the case was submitted to the jury, had asked the court for a peremptory in-

struction to find for the defendant, which the court refused to give (R. 57).

After the rendition of the verdict the petitioner filed its motion to set aside the verdict and grant a new trial (R. 77); also motion for judgment, notwithstanding the verdict (R. 76). These motions were overruled and the petitioner appealed to the Supreme Court of the State of Kansas.

The case was duly heard in that Court, and on May 4, 1929, the decision of the lower court was affirmed by a divided court, four of the justices holding in favor of affirmance and three for reversal. The majority opinion was written by Justice Hopkins, and the minority by Justice Burch. Within the time fixed by the rules of the court, the petitioner filed a motion for rehearing, which motion was, on July 5th, 1929, overruled without further opinion by the court. The majority and minority opinions are set forth in the transcript of the record.

For a better understanding of the general situation, a copy of the plat showing the station grounds which was used on the trial is attached hereto as an exhibit. Likewise photographs of the tracks at and about where Toops was killed, which also had been introduced in evidence, were made a part of the counter-abstract of appellee, and are found at pages 85, 86, of the record.

Reasons for the Allowance of the Writ.

Your petitioner respectfully represents that the writ of certiorari of this Honorable Court should issue be-

cause the Supreme Court of the State of Kansas has decided a Federal question of substance erroneously and not in accordance with applicable decisions of this Court and other Federal courts, as follows:

1. In holding that the evidence was sufficient to require submission to the jury.

2. In holding that the evidence was sufficient to uphold the jury's finding of negligence on the part of defendant and to support the verdict and judgment.

3. In holding that it was the duty of petitioner to protect the rear end of the cars being switched, and to give a signal when starting to back the cars in the switching operation, contrary to the decisions of this Court and other Federal courts under the Federal Employers' Liability Law.

4. In holding that the deceased did not assume the risks incident to the mode and manner in which the switching operations were being performed.

5. Because the verdict and judgment are based wholly upon speculation and conjecture as to how the deceased met his death, and not on any facts from which legitimate inferences could be drawn.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Kansas, commanding said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record

of all proceedings of the said Supreme Court of the State of Kansas in the said case therein entitled "Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased, Appellee, *vs.* The Atchison, Topeka and Santa Fe Railway Company, Appellant, No. 28499," to the end that the said case may be reviewed and determined by this Court as provided by law, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may be appropriate and in conformity with the Act of Congress in such cases made and provided, and that the said judgment of the Supreme Court of the State of Kansas in said case, and every part thereof, may be reversed by this Honorable Court.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY.
E. E. McINNIS,
Chicago, Illinois;
WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
ALFRED G. ARMSTRONG,
All of Topeka, Kansas;
WILLIAM OSMOND,
Of Great Bend, Kansas,
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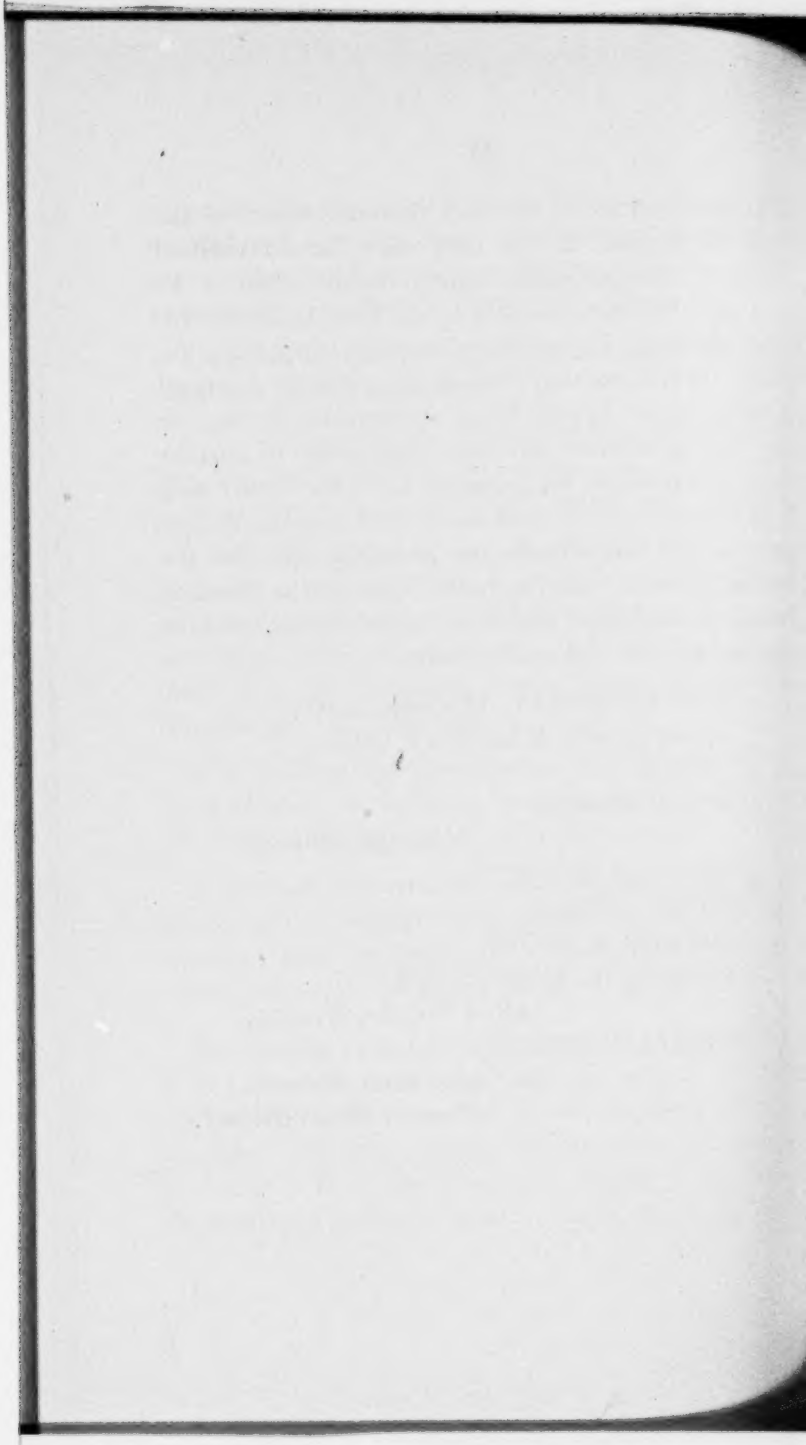

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Court Has Jurisdiction.

All the questions in this case arise under the Federal Employers' Liability Act, ch. 149, 35 Stat. 65. This case is governed by that Act and the principles of the common law as applied in the Courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of defendant.

Seaboard Air Line v. Horton, 233 U. S. 492, 502.

Except as specified in Section 4 of the Act, the employee assumes the ordinary risks of his employment, and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to the negligence of his employer and fellow employees.

Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, 445.

Ches. & Ohio Ry. v. Nixon, 271 U. S. 218.

If, upon an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 474.

Toledo, St. L. & W. R. Co. v. Allen, 48 S. Ct. 215.

Atlantic Coast Line v. Davis, 49 S. Ct. 210.

The gist of the petitioner's contention in this case is that the evidence did not support the verdict and judgment; hence under the foregoing decisions, we believe that we are justified in asking the Court to examine the record and see whether our contention is correct.

Statement.

We believe that we have made a sufficiently full statement of the facts of the case in our petition for the writ, and that it will not be necessary to repeat that statement in this brief except so far as it may become proper or desirable to restate some of the facts in the course of the argument.

All that the record discloses regarding the death of Toops is that the front brakeman standing on top of the train or cut of fifteen cars being pushed by the engine discovered a lighted lantern lying on the south side of the track and immediately signalled to the engineer to stop the train, which was done without delay. It was then that the body of Toops was found under the engine tender lying across the track, his feet to the north and his head and right shoulder over the south rail, apparently lying upon his back. His head and one of his arms were cut off. His lantern and hat lay two or three feet to the south of the rail (R. 26). The last time Toops was seen by anyone he was standing on the platform near the station, and just before that he had a conversation with brakeman Hemphill in which they talked about the moving of certain cars on the industry or elevator track. Hemphill testified:

> "Toops asked me if these fifteen cars were all in one cut, and I told him they were, and that I would take them all into the elevator track. He said 'All right, I will look out for them.' And that was the last, I think the last words, that I heard him speak. That is the last thing I said to him" (R. 39).

Where Toops was between that time and the moment of his death, how he got to the place where the cars ran over him, what he was doing when they ran over him, which car struck him first, all are left to conjecture and speculation, there being absolutely no evidence to suggest the true answers to these queries.

As stated in the petition, the verdict and judgment of the lower court for $22,750.00 in favor of the plaintiff were affirmed by the Supreme Court of Kansas, which also approved the finding of negligence made by the jury, to wit: "(1) In not protecting rear end of fifteen grain cars; (2) in engineer not sounding signal when starting" (Finding 10, R. 75).

(In the petition we have referred to the westernmost car of the string of fifteen cars as the rear car. This was the furthest car from the engine, and as the engine was pushing the string of cars, the west car might well be referred to as the first car, rather than the rear car.)

The judgment was affirmed on May 4, 1929, and the opinion of the Supreme Court is reported in Volume 128 of Kansas Reports, page 189, contained in Advance Sheets of May, 1929, 277 Pac. 57. The petitioner's motion for a rehearing was overruled by the Supreme Court of Kansas on July 5, 1929, which constituted the final judgment in the case.

Assignments of Error.

The Supreme Court of Kansas erred:

1. In holding that the evidence was sufficient to require submission of the case to the jury.

2. In holding that the evidence was sufficient to uphold the jury's finding of negligence on the part of defendant and to support the verdict and judgment.

3. In holding that it was the duty of petitioner to protect the rear end of the cars being switched and to

give a signal when starting to back the cars in the switching operation, contrary to the decisions of this Court and other Federal courts under the Federal Employers' Liability Law.

4. In holding that the deceased did not assume the risks incident to the mode and manner in which the switching operations were being performed.

5. Because the verdict and judgment are based wholly upon speculation and conjecture as to how the deceased met his death, and not on any facts from which legitimate inference could be drawn.

6. In affirming the judgment of the court below in favor of the plaintiff (respondent) and against the defendant (petitioner).

ARGUMENT.

The Contention of Your Petitioner is Twofold.

I.

We claim that there was absolutely no evidence to show that the negligent acts found by the jury in the original trial of this case were the proximate cause of the death of Toops. In other words, admitting the Company was guilty of the acts found by the jury, and that those acts were negligent, yet there is no evidence that such negligent acts were the cause of Toops' death.

II.

We contend that, under the decisions of this Court and the Federal courts generally, the acts complained of and found by the jury were not negligent acts as a matter of law.

I.

THERE WAS NO EVIDENCE TO SHOW THAT THE NEGLIGENT ACTS FOUND BY THE JURY WERE THE PROXIMATE CAUSE OF THE DEATH OF TOOPS.

As a matter of fact, this action was brought on suspicion, tried without evidence, and determined on surmise. Taking all of the evidence introduced at the trial, it seems clear to us that the plaintiff failed to show many essential facts which would be necessary to entitle him to go to the jury on the issues. Whatever minor discrepancies there may be in the testimony of the various witnesses for the respondent, several things stand out very clearly.

Toops was conductor in entire charge of the train and its movements. All of the other employees were acting under his direction and subject to his instructions. Although this was his first trip for several years over this line, yet he had formerly worked on this division and was familiar with the general layout. No changes had taken place in the tracks and the surroundings in that part of the yards. He was provided with a good electric lantern. He knew what work was to be done in the yards and talked with his train crew

about such work. He himself assisted in the first part of the switching at Rolla. His work consisted of bringing cars from the side tracks and attaching them to the main train. He talked over with Brakeman Hemphill what should be done with reference to certain grain cars which were to be spotted on the elevator track and which had to be separated from some stock cars. The rest of the train crew started from the main track close to the station platform to attend to the placing of those grain and stock cars and Toops stayed upon the station platform, telling Hemphill, the brakeman, that he, would look out for the grain cars. The crew of said train then picked up the stock and grain cars, placed the stock cars, and were proceeding to place the grain cars on the elevator track. During the time that they were so engaged no one saw Toops or his lantern, and nothing was seen of him by any member of the train crew until his body was found under the wheels of the engine tender at a point adjacent to the derail switch. This was not upon the main line but was upon one of the sidetracks south of the main track. Where was Toops in the meanwhile? What was he doing when the grain cars ran over him? Which car struck him? How did he get to the place where the cars ran over him? If he did not see that the cars were being backed up or kicked in, why did he not see them? If he did see them, why did he permit himself to be struck and killed? These are facts which constitute the very gist of this case, and yet on none of these matters is the slightest evidence given on behalf of the plaintiff. All of these questions are

left to the conjecture of the jury and of the court as to how they should be answered.

In her petition, the respondent alleged that Conductor Toops, after having coupled the air upon the five grain cars, walked to the east end of the station and to a truck which was standing there, where he remained for a few minutes going through his order sheet. That after completing this work he went east approximately 325 feet along the main-line track and to a point north of the derail on the elevator track. That he was conductor and in charge of said train, and that as such conductor it was his duty to assist in spotting cars and switching trains. That his proper position was on the right hand, or the engineer's side, of the train, which in this case was the south side; that it was necessary for him to go south and cross the elevator track in order to reach the south side of the train, and that he carefully, cautiously and while in the line of his duty, proceeded across said elevator track to a point three or four feet east of the derail on the track, with the intention of placing himself in a position to assist at setting the cars to the elevators thereon; that he was in the exercise of his duty in proceeding as above described; that the elevator track at this point was negligently constructed and in a dangerous condition. That the only light Conductor Toops had was the electric lantern and it was necessary for him to carefully watch his footsteps. That just as he stepped on said elevator track he was without warning struck by the west end of the fifteen moving grain cars which had been negligently, carelessly and reck-

lessly kicked in onto the elevator track by the engine crew.

There you have plaintiff's theory of the case. In the evidence we have nothing except that Toops must have moved from the east end of the platform of the station to the point where he was killed. As to the other allegations there is absolutely no proof. What his movements were cannot be known and the trial court and the Supreme Court of Kansas, in approving the work of the jury, could not supply the lack of evidence to prove these very essential facts. The respondent alleged that Toops was struck by the west end of the fifteen moving grain cars. No evidence whatever supports this, but all the evidence indicates he was struck by the second car, because plaintiff's witnesses and those of defendant all agree that there were no marks of blood on the rear car, but that on the second and other cars, up to the engine, marks of blood were found on the wheels, and defendant's witnesses without contradiction state that bits of flesh as well as blood were found on all wheels except those of the rear car (R. 52). This indicates that in some manner he got between the fourteenth and fifteenth cars, and was never struck by the fifteenth.

Of course, it is absolutely a matter of surmise as to how he came to be there between the first and second cars, but at least our surmise may be as plausible and as worthy of belief as that of plaintiff. It might readily be that Toops, having finished whatever work he had been doing, went forward to meet the string of cars that was to be pushed backward by the engine;

that he attempted to get on the top of said cars to ride to the point where the cars were to be spotted and that he attempted this between the first and second car and that for some reason he slipped and fell between the two cars, and that he was then struck and killed by the second car from the rear.

The Supreme Court of Kansas, in the opinion written by Justice Hopkins, indicates that he could not have been attempting to get onto the cars because if he had been so doing his body would not have been found between the rails but would have been on the side of the track. This shows entire unfamiliarity with the structure and arrangement of the ladders on box cars. On every box car there is a ladder at each end on the side of the car, and in addition to these ladders on the side of the car there are also ladders on the end of the car, right around the corner from the side ladders, and it might very readily be that Toops caught onto the side ladder and swung around to the ladder on the end for the purpose of reaching the top of the car; and this would thoroughly explain how it was that he may have fallen and his body might have been found between the rails. Of course, this is pure surmise, but it does not seem so improbable as the explanation given by the jury and approved by the trial court, and afterwards by the Supreme Court of Kansas.

In the course of the majority opinion written by Justice Hopkins of the Supreme Court, he makes use of the following language:

> "The deceased was not familiar with the elevator track. He approached it in the dark from

the north for the first time in thirteen years. He is presumed to have been exercising due care and it may therefore be assumed that when he arrived at the track and attempted to cross it he listened for signals and heard none; that he looked for approaching cars with a light, and saw none, and that he stepped upon the defective track for the purpose of crossing over and instantly became aware that the kicked cars were upon him, but on account of the defective condition of the track it was impossible for him to escape; that in making an effort to escape he was knocked down, and as he fell forward his hat, lantern and pencil were propelled to the south side of the track. On account of the curve in the track his lighted lantern (which was thrown or fell out of his hand), could not be seen by the crew. The position of the body indicates that he was knocked down by the west end of the moving grain cars. His train book, containing 34 or 35 bills, dropped into the center of the track, between the rails, and was lying two or three feet east of his body."

The various assumptions made by the Supreme Court *are* assumptions, or surmises, and are without any evidence whatever to support them. The statement made by Justice Hopkins corresponds very largely with the theory of the respondent in her pleadings and evidence. While it possibly might be true that these were the actual facts, yet this court cannot say, nor can any court, that these were necessarily the facts. Any other theory, equally plausible, would prevent the inferences that were made by the Supreme Court of Kansas. Take, for instance, the idea or theory that

he was struck by the rear car in the train. He might have fallen, as suggested by the court, on account of the fact that there was very little dirt between the ties and a good many weeds and thistles. There is no evidence that they in any way interfered with his crossing over the track, if he were so doing. He may have been intending to cross over the track, if we find that he was really struck by the rear car, of which fact there is no evidence; or he may have stumbled over a rail instead of a tie or on account of being entangled in the weeds. No way has yet been discovered of operating a railroad without the use of rails, and one could just as easily fall over a rail as stumble on a tie that was insufficiently ballasted. One theory is just as plausible as another as to how he might have got under the train. In the opinion of Justice Hopkins, he says:

> "Inasmuch as he had come south to cross the track it is natural to conclude that when he was struck his pencil and lantern were thrown out and away from the track. His train book with the bills in it was found in the center of the track between the rails and east of his body, indicating that he was carrying the train book in his left hand at the time he was struck and dropped it in the center of the track. Had he attempted to climb on the train and fallen off, the train book would undoubtedly have been found in his pocket."

If such inferences can be made in the trial of a lawsuit, evidence would not seem to be a necessary part of the trial.

In another place in his opinion, the Supreme Court of Kansas says:

> "He did not know that they would come silently down upon him, without a white light on the leading car."

We desire particularly to call attention to the use of the word "silently." There is absolutely no evidence to show that the cars were moving silently. Such a thing as a silent movement of cars is hardly conceivable, and especially would this be the case where the cars were coming, as they were in this case, around a rather sharp curve. The friction of the wheels on the rails always produces a noise that can be heard from a great distance. Every time a car passes from one rail to another a distinct click can be heard. Whenever cars bump against each other in making up a train a noise is distinctly heard from the concussion through the entire length of train. The night was a dark night. This would undoubtedly interfere with vision, but certainly it would not interfere with hearing. The hour was a little after midnight and there would be nothing to interfere with the transmission of sound. As we have said, moving cars always make a sound and this is especially perceptible in the late hours of the night. At that time one can hear in the city the approach of street cars and the movement of trains at a considerable distance from where one lies abed. We can only surmise, as the court below seems to have done, that Toops was unaware of the approach

of the cars which ran over him. Of course, if Toops was aware of the approach of the cars, the absence of a brakeman and a lighted lantern on the rear of the approaching cars, or the failure of the engineer to give any signals, would make no difference. The object of these regulations, if there are such regulations, would be simply to apprise one of the presence and approach of the cars, and if he actually knew of this, there would be no occasion for signals.

The jury specially found that Toops had a good electric lantern, and then they made an additional finding; that Toops could not have seen the approaching cars by the aid of his lantern. There is not a syllable of evidence to support this finding. One of the objects in furnishing trainmen with a lantern is that they may be enabled to see approaching cars. Of course, they are also used for signals, but just as much to enable the one using them to go among cars without receiving injury. The rear brakeman, Hemphill, was also supplied with a good electric lantern and the front brakeman, Nolan, was supplied with an oil lantern. The conductor, Toops, Hemphill and Nolan, by the aid of these lanterns had assembled cars for switching, had made couplings, had changed switches, and had done all of the things ordinarily done in the operation of switching. If the brakemen were able to do these things as indicated, it is impossible to see why Conductor Toops was not able to do the same. With the aid of his lantern, he had assisted in the movement of cars and in attaching them to the train on the main track at an earlier time in said night. To do this it

was necessary for him to see the approach and movement of the cars he was to handle and the only way that he could see them, aside from the starlight, was by the aid of his lantern; and it is certainly presumptuous, in the absence of evidence, for the jury to say that Toops could not have done the same thing.

Admitting, however, for the sake of argument, that the jury was right in finding that Conductor Toops was not able to see the approaching cars by the aid of his lantern, then it would seem to us that the final analysis of the situation would be that the accident was due to the inefficiency of the lantern and Toops' consequent inability to see the cars approaching and possibly the surrounding situation as to tracks. Toops used this lantern at least all the time after the train stopped at the station of Rolla. If the lantern was inefficient and was not able to do what a lantern is intended for and is expected to do, then no one was more aware of the inefficiency of the lantern than Toops himself. Toops, in using an ineffective agency, of which he must have had knowledge, would seem to us, under the rule laid down as to master and servant, to have assumed a risk of his employment, and therefore would not be entitled to recovery.

It is therefore seen that the three grounds of negligence found by the jury—the failure to protect the rear end of the grain cars, the failure of the engineer to give a signal when starting to back cars around the curve and through the cut, and the poor condition of the track at the derail switch—did not necessarily have anything to do with the death of Toops.

In the opinion of Justice Hopkins he lays considerable stress upon a distinction which he finds between stations and railroad yards. He admits that petitioner's argument would be entirely correct and decisive if it applied to railroad yards. He quotes the rules of the company and definitions therein:

> "Station.—A place designated on the time table by name at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."
>
> "Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time table, or by train order, may be made, subject to prescribed signals and regulations."
>
> "Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."
>
> "Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

These last two rules, he says in effect, do not apply because the place where the accident occurred was not a yard but was a station. The confusion in his mind, in our opinion, seems to have arisen from the fact that stations and yards are defined separately. Certainly the definition of "yards" as quoted above covers the situation at Rolla. There was a place for the making up of trains, storing of cars and other purposes and

movements not authorized by the time table or by train orders might be made there. It seems to us that the trouble arises from the idea that the rules of the railroad classify stations on its tracks; that is, that it calls some of them "stations" and calls others "yards." There seems to be no basis in the testimony nor in fact for such a classification. In performing switching operations, the fact that the yards might also be at a station, it would seem to us, would make absolutely no difference. The rules do not seem to attempt to strictly distinguish stations from yards. We might say, for instance, that in the State of Kansas cities were divided into three classes: first, second, and third. Under this classification, a city could not belong to more than one class, as that would be a matter of population, etc. But there is nothing to prevent having yards at stations; in fact, almost every station has switches, sidetracks and yards in which to do switching, storing of cars, and other matters incident to the operation of a railroad. The station, as a station, has one purpose, principally the control of trains by telegraphic orders; the yards have another; and it seems rather forced to say, as the court in Kansas does say, that Rolla is a station, and not a yard, and therefore not covered by the rule with reference to switching, regardless of the purpose for which the tracks are used. Whether the yards be large or small, the rule with reference to protecting the other members of the switching crew from injury would probably be the same. It is a matter of construction of the definition and certainly the definition of "yards" would

cover the station at Rolla. If there is any ambiguity about the rule, the practical construction placed upon it by trainmen, as shown by the evidence, was that it was not the custom in handling and switching cars at stations to observe the rule which might be applied to "stations," and not the rule as to "yards." That is, it was not the custom to have a lighted lantern on the rear of the car, or brakeman located there, except where the switching was going on over a highway crossing. It is true that there was a highway crossing over the station grounds at Rolla, but it was several hundred feet west of the place where the accident occurred.

A common-sense definition of the word "yards" is to be found in *George v. Quincy, O., & K. C. R. Co.*, 139 Mo. Ct. Ap. 283. The matter is summed up in the first paragraph of the syllabus:

> "Rev. St. 1909, Sec. 3163, requires railroads to block all switches, frogs, and guard rails 'in all yards, divisional and terminal stations, and where trains are made up.' HELD, that the word 'yards' was not limited to yards maintained at divisional or terminal stations, or where many parallel tracks are maintained, and cars habitually switched, but included a way station at which there was a system of tracks where cars could be cut out of a train and stored, loaded or unloaded, or delivered to connecting lines, and where switching was customarily or habitually, though not constantly, carried on."

In the course of the opinion in the George case, Justice Trimble uses the following language:

"Every one knows that every railroad station has a 'yard' of its own, by which is meant a place or piece of ground, usually within certain reasonable limits, though not necessarily inclosed, surrounding the depot or station, and used to switch and stand cars therein for the purpose of loading or unloading freight handled at that point, and for other purposes connected with the railroad business transacted at such station. Such place, in ordinary language, used by the persons in charge of such stations, as well as by the public doing business thereat, is termed a 'yard.' And in it there is always more or less switching to be done in order to deliver and take away cars at said station." * * * (p. 154).

The following principles applicable to cases arising under the Federal Employers' Liability Act have been enunciated by the Supreme Court of the United States.

In case of accident to an employee, he must prove not only the cause which operated to produce the injury, but also some negligent act or omission of the employer in which the cause of injury originated. The fact of accident does not warrant an inference of negligence. Negligence is an affirmative fact which must be established by evidence. When the evidence leaves cause of injury in doubt, and any one of several things may have been the cause, the jury may not choose one of them by guess, and find negligence without a satisfactory basis for the conclusion. With the presumption that the injured employee used due care goes the correlative presumption that the employer used due care. This presumption must be overcome by evidence. When circumstantial evidence is relied on to prove a

fact, the circumstances must be proved. The circumstances must not themselves be presumed, and one presumption cannot be built upon another.

Patton v. Texas and Pacific Ry. Co., 179 U. S. 658.
Looney v. Metropolitan R. R. Co., 200 U. S. 480.
Chi., Rock Island & Pac. Ry. v. Bond, 240 U. S. 449.
New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367, 371.
C., M. & St. P. Ry. v. Coogan, 271 U. S. 472.

In the *Patton* case, in the syllabus, it is said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish, that the employer has been guilty of negligence: * * * in the latter case, it is not sufficient for the employee to show that the employer may have been guilty of negligence, but the evidence must point to the fact that he was; and where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

In the *Looney* case, it is held that in an action for damages for personal injuries, while the defendant has the burden of proof of contributory negligence, the

plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff. There is equally a presumption that the defendant performed his duty.

In the *Harris* case, it is held that rights and obligations under the Federal Employers' Liability Act depend upon it, the principles of common law are applicable and negligence is essential to recovery, and in the course of the opinion the court says:

> "The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish." * * *

The *Coogan* case is the one particular case upon which petitioner relied in the trial of this case before the jury and also in its contention before the Supreme Court of Kansas. In that case at the close of the evidence the petitioner moved the court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of the petitioner, and that any verdict for respondent would be based upon speculation and conjecture, and in the decision this contention on the part of the petitioner was sustained. Again, the

court holds that the rights and obligations of the petitioner depend upon the Employers' Liability Act and applicable principles of common law as interpreted by the federal courts; that the Supreme Court should examine the record and if it is found that, as a matter of law, the evidence is not sufficient to sustain the finding, and that the carrier's negligence was the cause of the death, judgment should be reversed. The contention of the respondent was that a stretch of pipe line about fifteen feet in length had been loosened and bent three or four inches toward the rail, and that this condition of affairs had lasted for some months. The court says:

> "The evidence is sufficient to warrant a finding that there was a breach of duty in this respect. But the precise question for decision is whether the condition of the pipe caused or contributed to cause the death of deceased. * * *

and the court held that there was not sufficient evidence connecting the injury with the negligence so found. Quoting from the decision, the court says:

> "It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. * * * There is nothing to show

that the pipe had any connection with the accident. The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. One between cars coupling the air hose is very liable to be run over if the train is unexpectedly moved. A finding that his foot was not caught under the pipe is quite as consistent with the evidence as a finding that it was.

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. * * * When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture."

Giving the foregoing decisions and others their full force and effect, it would seem to us that upon this branch of the case there must be a holding that even if the so-called acts of negligence had been proven, yet in the absence of proof that the injury was due to any one of the so-called acts of negligence the decision must be in favor of the petitioner.

II.

UNDER THE DECISIONS OF THIS COURT AND OF THE FEDERAL COURTS GENERALLY, THE NEGLIGENT ACTS COMPLAINED OF AND FOUND BY THE JURY WERE NOT NEGLIGENT ACTS AS A MATTER OF LAW.

But there is on the other branch of the case a very serious question as to whether the negligence found by the jury in answer to special question No. 10 would constitute actionable negligence. Question No. 10 submitted to the jury was as follows:

> State fully in what the negligence of the defendant consisted, if any.
>
> Answer First. In not protecting the rear end of the fifteen grain cars.
>
> Second. In engineer not sounding signal when starting to back cars around curve and through cut.
>
> Third. Poor condition of track at derail switch.

The second ground of negligence, that the engineer did not sound signal when starting to back cars around curve and through cut, has no evidence to support it so far as "through cut" is concerned. It is true that the engineer was sending the cars around a curve, but, as to the "cut," the evidence shows that on the south side of the track the ground was higher, possibly six or eight feet higher, but not that there was a cut there, and the north side of the track was the natural surface of the ground, the same as the rest of the yards, and

a person looking from east of the depot toward the track would not have his view impeded by anything on the north side of the track. This will be plainly seen in the photograph attached to the transcript of the record.

In the very recent case of *Kansas City Southern Railway Company v. Jones,* 276 U. S. 303, the court says:

> "No one saw the death, but the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witnesses say was not rung on this occasion. The court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as the time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he was so engaged, still more that he was absorbed in such work. The main track was straight and the train was making a great

> noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself." * * *

The latest expression of the Supreme Court of the United States is to be found in the case of *Toledo, St. Louis & Western R. R. Co. v. Allen*, 276 U. S. 165, and inasmuch as all of the principles involved in actions like the present one are somewhat fully discussed, we quote quite freely from this case:

> "October 27, 1922, petitioner's railway system was being operated by a receiver as a common carrier of interstate commerce. Respondent was a car checker in the service of the receiver; and, while employed in such commerce in petitioner's railroad yard at Madison, Illinois, he was struck and injured by a shunted car. He brought this action in the Circuit Court of Saint Louis, Missouri, claiming damages under the Employers' Liability Act, U. S. C., Tit. 45, c. 2, Section 51. * * *
>
> "The yard where plaintiff was injured included a lead track, and connected with it, a number of parallel switch tracks, the centers of which were about twelve feet apart. Plaintiff had been regularly employed there as a car checker for about eighteen months, and his hours were from 11 in the evening to 7 in the morning. His work required him to be in the yard while switching was being done and to go from place to place to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains.

"At the time of the accident he was checking a string of cars that had been placed on Track 5, and was between it and Track 4, about 125 yards from the lead. A switching crew was at work in the yard. The engine was on the lead attached to from twenty to twenty-five cars that were between it and Switch 4. Two cinder cars were detached from the end while the string of cars was being pushed by the engine.

"They were shunted by means of the switch to Track 4, and by their momentum moved to the place where plaintiff was struck. The yard was not artificially lighted. It was an ordinary starlight night, without moon. The shunted cars moved at moderate speed—4 to 6 miles per hour—and made noise enough to be heard at a distance of one or two car lengths. They were unlighted and unattended, and no person warned plaintiff of their approach.

"The Act of Congress under which plaintiff seeks recovery took possession of the field of liability of carriers by railway for injuries sustained by their employees while engaged in interstate commerce, and superseded state laws upon that subject. *Second Employers' Liability Cases,* 223 U. S. 1, 55. This case is governed by that act and the principles of the common law as applied in the courts of the United States. The plaintiff can not recover in the absence of negligence on the part of defendant. *Seaboard Air Line v. Horton,* 223 U. S. 42, 502.

"And, except as specified in Section 4 of the Act, the employee assumes the ordinary risks of his employment, and when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees. *Boldt v. Penn-*

sylvania R. R. Co., 245 U. S. 441; *Ches. & Ohio Ry. v. Nixon*, 271 U. S. 218. If, upon examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. *C. M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, 474. * * *

"Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. *Missouri Pacific Railroad Co. v. Aeby*, 275 U. S. 426; 48 Sup. Ct. R. 177. The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt a rule for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 529.

"Carriers like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle v. Milwaukee Railway*, 122 U. S. 189, 194; *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482; *Washington, etc., Railroad Co. v. McDade*, 135 U. S. 554, 570. * * *

"And the Court authorized the jury to find the defendant negligent in failing to cause the

engine bell to be rung and in sending the cars along Track 4 without a light and unattended. The opinion below declares that the starting or running of the switch engine without ringing a bell or blowing a whistle was evidence of negligence; and that if, according to the practice, cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him or knowledge of such custom or practice on his part, the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and did not assume the risk.

"Obviously the ringing of the bell when and after the cinder cars were uncoupled or when the engine started or while it was running would not have been useful as a warning to plaintiff. When the cars were detached, he was from three to four hundred feet from the lead track and the engine was at the other end of the string of cars. The decision on this point is contrary to the rule followed in the Federal Courts. *Aerkeltz v. Humphreys,* 145 U. S. 418, was a case presenting a situation similar to that here involved. It is there said (p. 420): 'The ringing of bells and the sounding of whistles on trains moving forwards and backwards, would have simply tended to confusion.' And see *Rosney v. Erie R. Co.,* 135 Fed. 311, 315; *Connelley v. Pennsylvania R. R. Co.,* 201 Fed. 54, 57.

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that

he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkeftz v. Humphreys, supra.*

"In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him. *Boldt v. Pennsylvania R. R. Co., supra; Ches. & Ohio Ry. v. Nixon, supra; Randall v. Baltimore & Ohio R. R. Co., supra; Tuttle v. Milwaukee Railway Co., supra.* • • •

"There is no claim that he was not about his work in the usual way or that he could not have avoided the cars if he had known they were coming. A slight movement on his part would have been enough. When the engine pushed the string westerly along the lead to give the cinder cars momentum, the field man was on the south side of the lead and turned switch 4 to shunt them on that track. There is no evidence that he saw plaintiff or knew where he was while the switching movement was being made.

"The foreman of the crew was on the north side near the westerly end of the string of cars. He lifted the coupling pin to detach the cinder cars and gave signals for the starting and stopping of the engine in order to give them the desired impulse. He saw the lantern carried by plaintiff on the north side of the cars on track

5 and assumed that plaintiff was at work there. Plaintiff's son was the other switchman. He was on the north side near the middle of the string of cars and received from the foreman and transmitted to the engineer the signals for the starting and stopping of the engine. He also saw plaintiff's lantern. Neither engineer nor foreman knew where plaintiff was.

"The mere fact that the foreman and plaintiff's son saw the lantern and knew that plaintiff was checking cars on track 5 is not sufficient. There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. *Illinois Central Railroad Co. v. Ackerman,* 144 Fed. 959, 962.

"In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard, or to warn or to take other steps to protect him."

In *Elliott on Railroads,* Vol. 3, Second Edition, paragraph 1258, it is said:

"Even as to employees the company is under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yards, for the purpose of notifying such employees, who are familiar with the operation of the yard."

We refrain from extending this brief and discussion because the contention of petitioner is so fully and

forcibly set forth in the dissenting opinion of Justice Burch (which opinion is copied in full in the Transcript of the Record, pages 106-116 that little can be added which would be of assistance to this Court in analyzing the situation, applying the law and arriving at a conclusion. We respectfully request the Court to read and carefully consider this dissenting opinion. In conclusion we desire to call attention of the Court to the fact that if Toops was in a position of danger, absolutely no one knew of such position.

Respectfully submitted,

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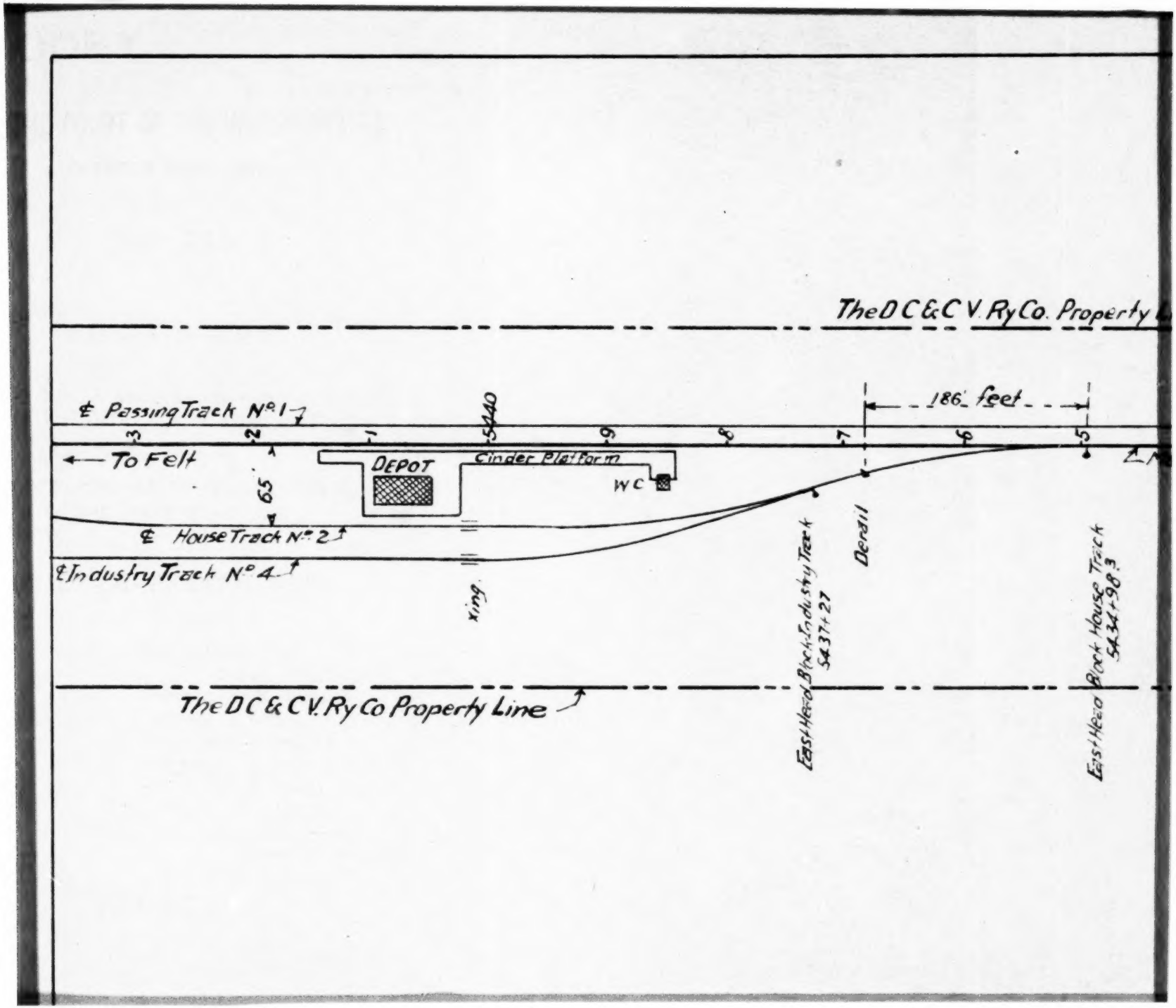
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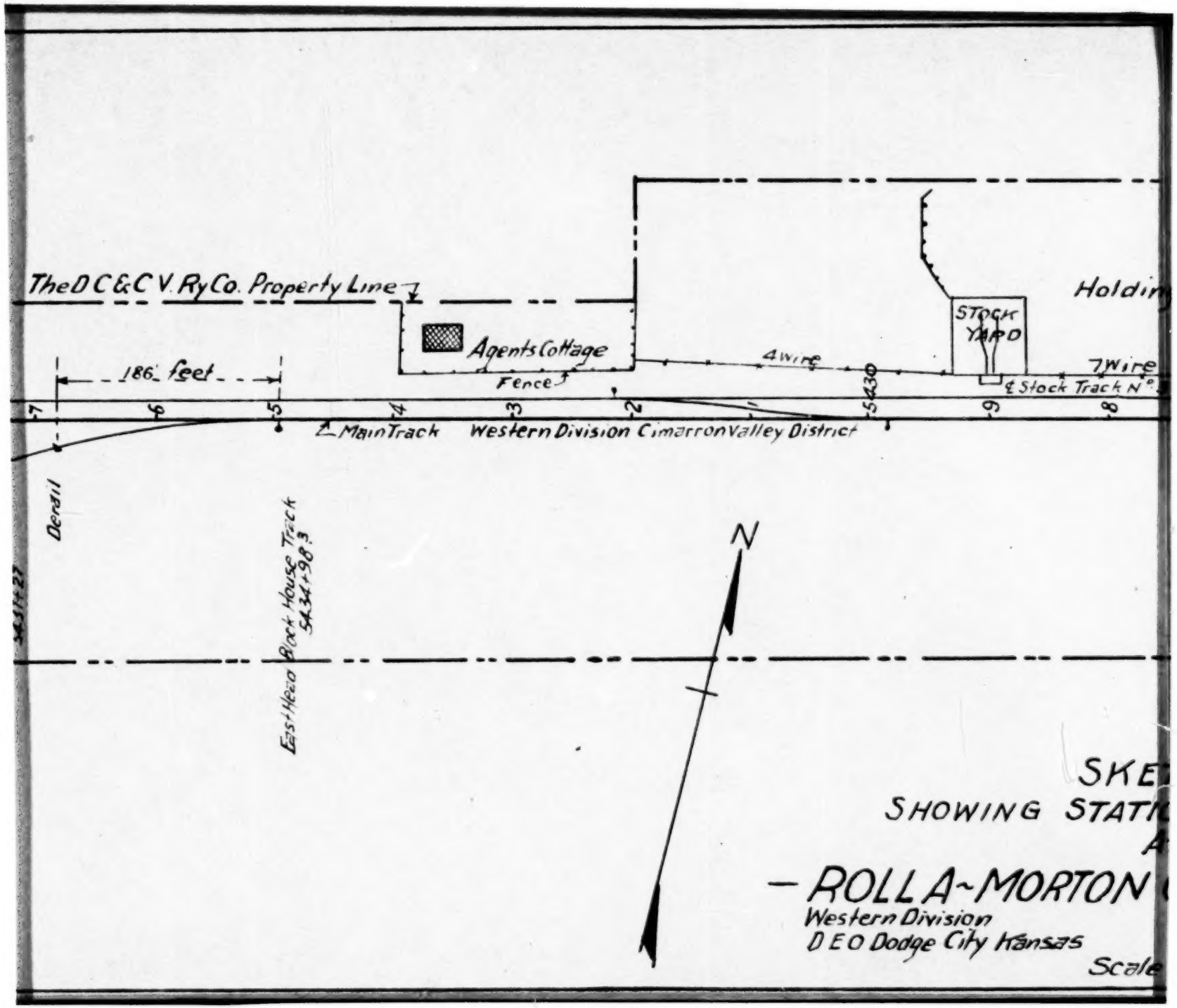
Derail
East Head Block House Track
54 34+98.3
The D C & C V. Ry Co Property Line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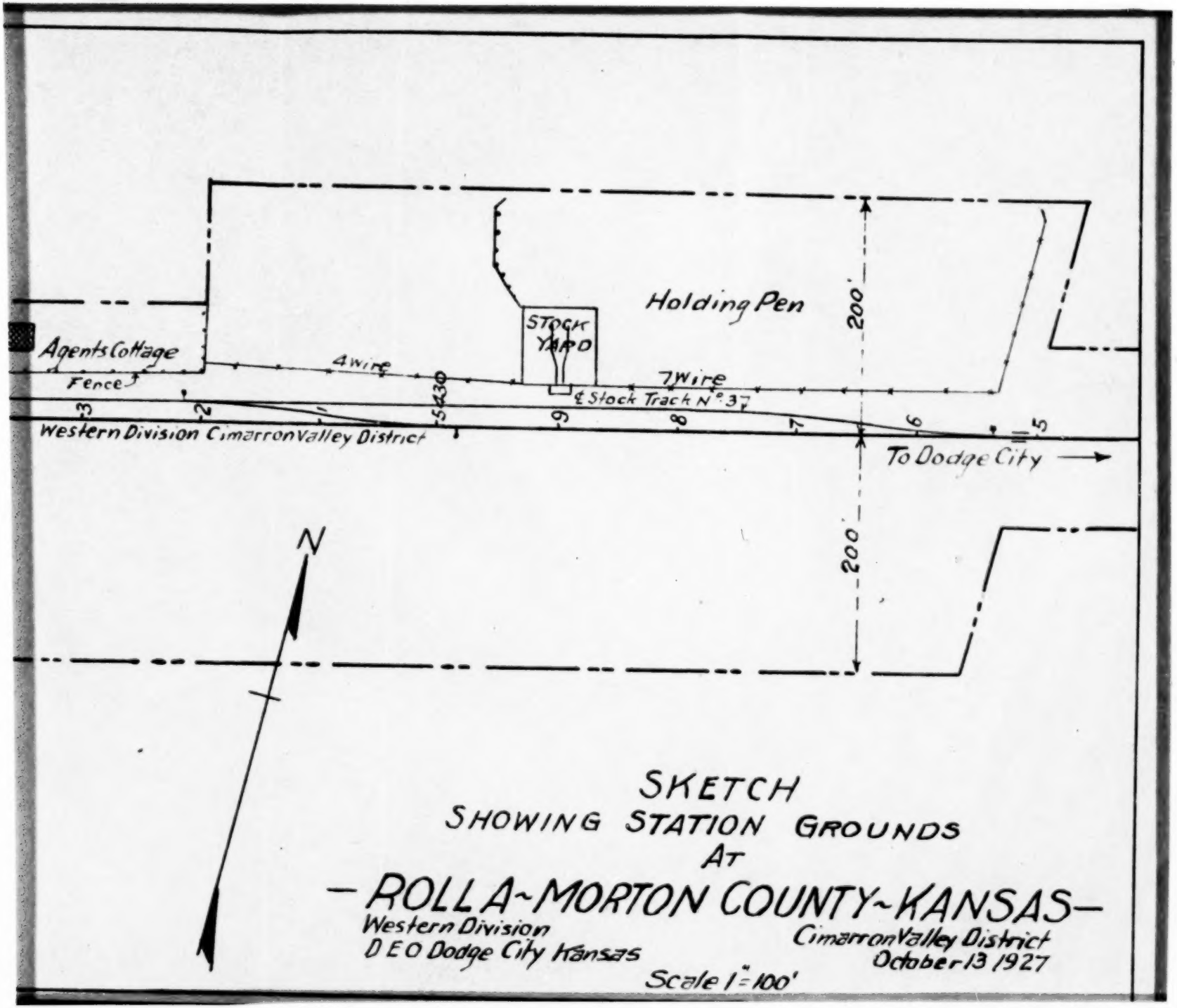
— ROLLA-MORTON
Western Division
D E O Dodge City Kansas
Scale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Fence
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AT
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